The appellant submitted that the charge was bad for duplicity because it charged her with using criminal force on a police constable being a public servant in the execution of his duty as such public servant and also with intent to deter that person discharging his duty as such public servant which are separate and distinct offences under section 353 of the Penal Code. I do not think there is any doubt that there are six different offences contemplated in section 353 of the Penal Code. That section provides that whoever firstly assaults or secondly uses criminal force to any person being a public servant either (1) in the execution of his duty as such public servant or (2) with intent to prevent or deter that person from discharging his duty as such public servant or (3) in consequence of anything done or attempted to be done by such person in the lawful discharge of his duty as such public servant, shall be punished as provided in the section. If therefore a person is charged with using criminal force to any person being a public servant "in the execution of his duty as such public servant or with intent to deter that person from discharging his duty as such public servant" that charge would be bad for duplicity as there are two separate offences charged in the alternative (*R.* v. *Wells, etc. JJ., Ex p. Clifford* [1] and *R.* v. *Wilmot* [2]).

The operative wording in the present charge however is as follows:—

> "....a public servant in the execution of his duties ....with intent to deter the said Ismail bin Ramli, police constable 30526, from the discharge of his duties as such public servant...."

In my opinion this charge is not bad for duplicity because, although the offences charged are separate offences, they are charged conjunctively and it is permissible to do so where, as in the present case, the matter relates to one single incident. The authority for this is *R.* v. *Clow* [3] in which a number of cases which were or were not held to be bad for duplicity were considered and distinguished. In the present case the words in the charge "with intent to deter the said Ismail bin Ramli, police constable 30526, from the discharge of his duties as such public servant" were unnecessary and all the prosecution achieved by using them was to saddle themselves with the additional burden of proving the particular intent alleged.

I accordingly held that this ground of appeal failed.

On the second ground of appeal the facts which were disclosed in the evidence were in brief that the son of the appellant was selling handkerchiefs on a small stall on the five foot-way of Penang Road, Penang, a short distance away from where the appellant also was selling articles on a stall. On the record it was not at all clear what provision of what law the son of the appellant was alleged to have broken. It was also not clear whether the son of the appellant was at any time under arrest. Even if it had been clear that he was supposed to be under arrest, as it was not known what provision of what law he was supposed to have transgressed, it would have been impossible to say whether that arrest was legal or illegal. The facts were not altogether dissimilar from those in the case of *Public Prosecutor* v. *Kok Khee* [4] in which on the facts the learned judge stated:—

> "The facts as stated in skeleton outline would appear to justify the respondent putting up a struggle since he was resisting an illegal or unjustifiable use of force towards him. Unless and until an arrest had been made legally, in the proper form, as set out in section 15(i) of the Criminal Procedure Code — and there is nothing to suggest that this had been done — the respondent was, in my opinion, entitled to prevent or resist what ostensibly was an unlawful seizure or confiscation of the 'daching' which was his private property".

In the present case it is not at all clear what the situation was. It may very well be that the police constable was legally entitled to arrest the appellant's son and had in fact done so and was entitled to take possession of the handkerchiefs, etc. for the purpose of producing them as exhibits at a later stage, but we do not know. The prosecution however failed to prove that this was the case, that is to say failed to prove that the police constable was in law a public servant acting "in the execution of his duty".

Accordingly I allowed the appeal, quashed the conviction and sentence and ordered the fine to be repaid.

Appeal allowed.

Solicitors: *Lim, Lim & Oon.*

MURAD v. PUBLIC PROSECUTOR

[F.C. (Thomson L.P., Barakbah C.J. (Malaya) & Tan Ah Tah F.J.) April 27, 1964]

[K.L. — Federal Court Criminal Appeal No. 17 of 1964]

Penal Code, s. 302 — Murder — Provocation — Direction to jury — Matters relating to human psychology — State of mind between loss of self-control occasioned by provocation and insanity — Whether court should take cognisance of.

The appellant was convicted for murder in contravention of section 302 of the Penal Code. On appeal the conviction was attacked on the ground that the trial judge's direction to the jury as to provocation was not satisfactory in that it overlooked certain matters relating to human psychology, in particular the existence of a state of mind that is between the loss of self-control occasioned by provocation and some form of insanity.

Held: having read the statement of the law by the trial judge and having heard it discussed there was nothing in it which was not justified by the wording of the Penal Code or decisions of the English courts (which the court was compelled to treat with respect) nor was there any omission in it. The appeal should therefore be dismissed.

Cases referred to:—

(1) *Scruttons Ltd.* v. *Midland Silicones Ltd.* [1962] 1 All E.R. 1, 7; [1962] A.C. 446, 467.

(2) *Mancini* v. *Director of Public Prosecutions* [1942] A.C. 1.

FEDERAL COURT.

G. N. Christie for the appellant.

Gunn Chit Tuan (Deputy Public Prosecutor) for the respondent.

Thomson L.P. (delivering oral judgment): This appellant was convicted at Alor Star for the murder of a woman Puteh binti Mat Isa at a kampong near Jitra on the morning of 1st October, 1963, in contravention of section 302 of the Penal Code.

It has never been in question in any way that the appellant killed the dead woman. He did so by inserting a large knife at least twice into her person seriously damaging certain of the internal organs, particularly the liver, and causing a small cut over the flexor aspect of her right ring finger.

The killing was clearly the outcome of sexual jealousy. The appellant had been carrying on an intrigue with the dead woman with the full knowledge and consent of her husband. The night before the killing it came to his knowledge that she had had carnal connection with a Chinese and the following morning he reproached her. On being told to mind his own business he produced a knife and inflicted upon her the injuries which have been mentioned.

At the trial the appellant neither gave evidence on his own behalf nor did he make a statement. There was, however, produced by the prosecution a confession which he had made sometime previously, while in custody, to a magistrate and on the basis of that it was urged by his counsel that it was a case where murder was reduced by reason of provocation to culpable homicide not amounting to murder.

As I have said the killing was never denied and at no time was it suggested by the defence that the appellant was not guilty of any offence and the only defence was that what had been committed was culpable homicide not amounting to murder.

In the event the jury by a majority found him guilty of murder and it is against that conviction that he has now appealed.

The conviction has been attacked — although this has been put in a number of ways — on one ground only and that ground is that the trial judge's direction to the jury as to provocation was not satisfactory. It is not said that there is anything in it which is incorrect but it is said that it overlooks, or rather that the law which it states overlooks, certain matters relating tc human psychology, which, although of infrequent occurrence, are not unknown, in particular the existence of a state of mind that is somewhere between the loss of self-control occasioned by provocation and some form of insanity.

Before proceeding further I would read a passage from the judgment of Viscount Simonds in the case of *Scruttons, Ltd.* v. *Midland Silicones, Ltd.*[1] which expresses our attitude to such an argument in more felicitous words than I myself have at my command. What His Lordship said was:—

> "to me heterodoxy, or, as some might say, heresy, is not the more attractive because it is dignified by the name of reform. Nor will I easily be led by an undiscerning zeal for some abstract kind of justice to ignore our first duty, which is to administer justice according to law, the law which is established for us by Act of Parliament or the binding authority of precedent. The law is developed by the application of old principles to new circumstances. Therein lies its genius. Its reform by the abrogation of those principles is the task not of courts of law but of Parliament."

Approaching the matter in the light of that passage the law relating to provocation as a defence in homicide cases is stated in the first exception to section 300 of the Penal Code. That is, of course, a statement of the law of England as it was thought to be in 1860. Since then that law has been exegisized, but so far as I am aware in no way departed from, by a series of decisions of the English courts, notably the decision of the House of Lords in *Mancini's* case.[2]

I do not propose to quote at length that law as stated and summarised by the trial judge in the present case. Suffice it to say that having read his statement of it and having heard it discussed we can find nothing in it which is not justified by the wording of the Penal Code or decisions of the English courts which we feel compelled to treat with respect nor can we find any omission in it.

It has been said the jury might have had some difficulty in applying it to the facts of the present case. But for one thing that might well be. It is to be observed, however, that having said everything he very well could have said almost the last words the judge said to the jury were these:—

> "If you are satisfied there was sudden and grave provocation then it would be manslaughter. If you are not satisfied with this defence but nevertheless you are left with a reasonable doubt as to the existence or non-existence of the provocation, then also it would be manslaughter."

In short we regret to have to say that the criticism of the summing-up comes to no more than the old complaint that it was not as favourable to the prisoner as he would have wished it to be.

The appeal is dismissed.

Appeal dismissed.